UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

LEGACY HEALTH SYSTEM

and

Case No. 36-CA-10299

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 49

Adam D. Morrison and Lisa Dunn, Esqs.,
Portland, OR, for the General Counsel
Adam S. Collier, Esq., of Bullard, Smith,
Jernstedt and Wilson, Portland, OR, for the Respondent
Giles Gibson, Esq., of Carney, Buckley,
Hayes, Marsh & Gibson, Portland, OR, for the Union

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Portland, Oregon, on December 9, 2008. The charge was filed by Service Employees International Union, Local 49 (Union) on April 30, 2008. Amended and second amended charges were filed by the Union on May 5 and July 21, 2008, respectively. Thereafter, on September 30, 2008, the Regional Director for Region 19 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by Legacy Health System (Respondent) of Section 8(a)(1) and (3) National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a State of Oregon corporation with places of business in and around Portland, Oregon, where it operates acute care hospitals and rehabilitation centers. In the course and conduct of its operations the Respondent annually derives gross revenues in excess of \$250,000, and annually purchases and receives at its Portland, Oregon facilities goods valued in excess of \$50,000 directly from points outside the State of Oregon. It is admitted and

I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization Involved

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It is admitted, and I find, that the Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. Alleged Unfair Labor Practices

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A. Issues

The principal issue in this proceeding is whether the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act by maintaining and enforcing a practice or policy of prohibiting employees from simultaneously holding both unit and non-unit positions.

B. Facts

The Respondent, a hospital system based in the Portland metropolitan area, operates five hospitals, a research facility, and a number of clinics and labs. It employs a total of over 9000 employees. It maintains seven different collective bargaining agreements with various labor organizations, including two agreements with the Union herein. There are also many positions and/or departments that are not represented by a labor organization.

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For a number of years the Respondent has maintained an unwritten policy or practice of prohibiting employees from simultaneously holding both bargaining unit and non-bargaining unit positions. This policy however does not prohibit employees from simultaneously holding positions within two bargaining units, whether or not represented by the same union; nor does it prohibit employees from simultaneously holding two non-bargaining unit positions. Such occurrences happen regularly.

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There is no record evidence that the Respondent has ever advised its employees or the various unions that represent its employees of the existence of such an exclusionary policy, except as set forth below.

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While the length of time this policy has been in existence is unknown, the record shows it has been in existence for at least approximately the last nine years. Also unknown is the rationale underlying the practice; however Respondent's witnesses presumed that it was designed as a practical and expedient means of avoiding difficulties in administering the wage and benefit programs, and grievance/disciplinary procedures, which differ according to whether or not such matters are governed by collective bargaining agreements. The parties agree that such matters, including the terms and conditions of employment of an employee who is both a unit and non-unit employee, are mandatory subjects of bargaining.

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The Union did not become aware of the policy until so notified by a unit employee who had been told by a human resources representative that her application to hold a part-time non-unit position had been denied because she currently occupied a unit position.

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Employee Kathryn Milojevic is a Certified Nursing Assistant (CNA) who has worked for the Respondent at its Emanuel Hospital facility for 13 years. She is a unit employee. Employees have access to Respondent's online job postings, and may apply for jobs online. In

January 2008, Milojevic applied for a part-time position as a massage therapist at another facility operated by the Respondent. Thereafter she was scheduled for an interview with Manager Cheryl Doten. According to Milojevic the interview ended "very positively." However the following day, January 15, 2008, Milojevic received an email from Doten, as follows:

Milojevic then followed up on this rejection and was referred to Carole Ann Rogge, Employee

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Our recruiter said: Unfortunately because she [Milojevic] is in a union position at Emanuel [Hospital] we cannot put her in a non union position. Therefore, we are unable to proceed with reference checks, etc. for the on-call position. Thank you for coming in to meet with us today. We wish you well in your future.

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Relations Consultant. Rogge sent Milojevic the following email dated January 31, 2008:

I'm sorry for your situation. I understand your disappointment. You are currently

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under a bargaining unit contract in your CNA position. You are currently other positions covered by the union contract, but you cannot have one position under a union contract, and one not under a contract. I can explain this further is you would like to give me a call.

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Milojevic did phone Rogge about the matter. Rogge reiterated the substance of the foregoing email, and also stated, according to Milojevic, "if I were to work there in that non-represented position, that the union could take over that department or that job because I'm already in the union and that's not what they want." According to Milojevic, this is the only rationale Rogge gave, and Rogge did not mention anything about the possible confusion or difficulties to the Respondent that could result from an employee having both a unit and non-unit job.

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Rogge testified that during her phone conversation with Milojevic she relayed her understanding of the rationale behind the Respondent's policy, as follows:

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We had a practice of not allowing employees to hold both union and non-union positions because we could not administer all the collective bargaining contractual agreements in a non-bargaining position.

Further, she did not tell Milojevic that if she went to work in a non-union position, the Union could take over that position.

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Nicole Hauge, while continuing her classes in nursing school at a nearby community college, began working for the Respondent in February 2008 as a part-time Emergency Room Technician, a unit position. In April 2008, she applied for an externship position, a paid position within the Respondent's "Bridge to Practice Program," so that when she graduated from nursing school in 2009 she would be hired by the Respondent as a registered nurse. Shortly after submitting her application she received a phone call from Jamie Dreyer, Respondent's recruitment consultant, who explained that the Respondent had a policy against employees holding both a union and a non-union position. Dreyer advised her that she had the option of choosing one position or the other, but not both. Hauge, fearful of leaving her secure job before

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¹ The complaint does not allege that this statement by Rogge is an independent violation of Section 8(a)(1) of the Act, or that the Respondent's policy when originally adopted was discriminatorily motivated. Therefore, it appears unnecessary to determine whether or not the statement was made.

knowing whether she would be hired as an extern, decided to withdraw her application and remain at her current position.

William Youngren began working for the Respondent in 1989, and is currently a secretary in Neonatal Intensive Care, a unit position. On July 24, 2008 he applied for a part time position as a Hearing Screening Tech in the audiology department, a non-union position. Apparently he was initially accepted for the position as he received a phone call from Shauna Anderson, manager of the department, and he and Anderson agreed upon a time for Youngren's training the following week. That same day, however, Youngren received a call from someone in Respondent's human resources department who told him he was ineligible for the position "because they just don't mix a union/non-union job because...it was a messy thing and they didn't like to do it." Youngren asked whether it was possible to make an exception because there was an immediate need to have someone administer infant hearing screening tests to babies before they are released from the hospital. He was told there could be no exceptions to the policy. He was given no other reason for being rejected.

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The Union, upon learning of the policy from unit members and confirming with the Respondent that such a policy did in fact exist, filed the instant charge. Further, it requested bargaining over the issues presented by its unit members occupying dual positions, one within and one outside the coverage of the collective bargaining agreement. After extended negotiations the Respondent and Union resolved their differences, agreed that unit members would not be precluded from holding non-unit positions, and incorporated the understanding in the 2008-2011 collective bargaining agreement between Legacy Emanuel Hospital and the Union, as Article 20.7, entitled "Holding a Position Inside and Outside of the Bargaining Unit at the Same Time." However the policy continues to apply to employees who are not Emanuel Hospital unit employees represented by the Union.

Analysis and Conclusions

It may reasonably be concluded that the Respondent's policy is discriminatory and inherently destructive of important employee rights: the right to be free from union-based hiring criteria for job opportunities. Under the policy, once an employee has obtained an initial job with the Respondent, his or her future part-time employment opportunities become limited by whether or not that initial job happens to be a union-represented position. Thereafter, unless the employee elects to relinquish his current position, the employee is "locked in" to either union or non-union-represented jobs for the duration of his or her employment.

The substantial and adverse effects of the policy are graphically shown by the situations in which employees Milojevic, Hauge and Youngren (*supra*) found themselves: they were unable to supplement their income, advance their careers and/or enjoy other benefits of part time employment of their choosing simply because they happened to occupy unit positions. Conversely, the future job opportunities of employees who happen to occupy non-unit positions are similarly affected because of union considerations. Moreover, the policy is neither innocuous or limited in effect: it applies to some 9000 employees and affects the long-term livelihoods of those who could otherwise have availed themselves of the opportunity for dual employment within the Respondent's organization.²

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² As the General Counsel's brief amply shows, dual function employees have historically been included in bargaining units; therefore it follows that their employers must conform company policies to deal with such situations.

Accordingly, it is clear that the adverse effects of the discriminatory conduct on employees rights is substantial, rather than "comparatively slight." Therefore no proof of antiunion motivation is needed to establish a violation of the Act, and the burden shifts to the employer to produce evidence of legitimate and substantial business justification for its conduct. *Great Dane Trailers*, 388 U.S. 26 (1967).

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In *Honeywell, Inc.*, 318 NLRB 637 (1995), the Board, relying on *Great Dane Trailers* (*supra*), found a violation in a clearly analogous "inherently destructive" situation. In that case the employer, which was undergoing downsizing, maintained a discriminatory policy which allowed unrepresented employees to bid on certain available unrepresented positions at other locations of the employer (including subcontractors of the employer), while precluding union-represented employees from bidding on the same jobs.

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maintaining that in *Honeywell* the union-represented employees who could not bid on non-union jobs would no longer be employed, whereas employees of the Respondent, under its policy, are not in jeopardy of losing their jobs and are not precluded from applying for and transferring to other jobs within the Respondent's system. The similarity between *Honeywell* and the instant case, however, is the discriminatory job-bidding policy itself and the fact that in both situations employees have been adversely effected. As the Board stated, "The policy was discriminatory by virtue of limiting use of the [job bidding] procedure to employees not represented by the Union." Further, in the instant case, the effect of the discriminatory policy on employees, while not identical to the situation in *Honeywell*, is nevertheless real, immediate and substantial.

The Respondent in its brief distinguishes *Honeywell* from the instant situation,

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The Respondent, citing cases that validate an employer's hiring policy of denying employment to individuals who intend to simultaneously work for two different employers, maintains that it may similarly preclude its employees from simultaneously holding a unit and non-unit position. Clearly the two situations are not analogous. In the former, the employers' hiring policies are facially valid and are not premised on union considerations; in the latter the Respondent's hiring policy is premised on union considerations and is therefore facially discriminatory.

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Maintaining that its policy is premised upon "legitimate concerns and valid reasons," the Respondent lists and specifies eight distinct "legal uncertainties that could arise by allowing employees to simultaneously hold unit and non-unit positions," as follows:

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 Whether the daily overtime provisions of the collective bargaining agreement would apply if the employee worked more than eight total hours per day in the two positions;

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 Whether time spent working in a non-unit position would count as hours worked for benefits eligibility provisions under the collective bargaining agreement;

 Whether time spent working in a non-unit position would count toward seniority under the eligibility provisions of the collective bargaining agreement;

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• Whether the employee wold be terminated from the bargaining unit position if he/she was terminated from the non-unit position:

 ³ Willmar Electric Service, Inc., 303 NLRB 245, 246 fn. 2 (1991), enfd. 968 F2d 1327 (DC Cir. 1992); Little Rock Electrical Contractors, Inc., 327 NLRB 932 (1999); Exempla Lutheran Medical Center, 2007 NLRB LEXIS 272 (2007).

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- Whether the discipline in the non-unit position would count toward progressive discipline in the bargaining unit position;
- Whether the "just cause" provisions of the collective bargaining agreement would apply if the employee was disciplined in the non-unit position;
- Whether the grievance procedure would apply to issues arising in the nonunit position such as discipline; and
- Whether the employee would have the right to union representation in disciplinary meetings.

The Respondent then goes on to argue that these valid concerns and legal uncertainties both legitimize its policy, and demonstrate the difficulties inherent in simply rescinding the policy without first having negotiated and resolved these matters with the other unions that represent the Respondent's employees.

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Essentially, the enumerated items, which appear to be more in the nature of 15 administrative or labor relations concerns rather than "legal uncertainties." all have as their underlying basis the question of the extent to which the provisions of the various collective bargaining agreements would carry over to the employees' non-unit jobs. That these matters may be problematical, however, or, as the Respondent maintains, difficult to resolve through bargaining, does not thereby justify the existence of the Respondent's discriminatory policy. 20 Clearly, on balance, the Respondent's professed administrative or labor relations difficulties do not outweigh the fact that, as noted above, an indeterminate number of employees have been, and likely are continuing to be, denied job opportunities because of a facially discriminatory policy. Further, as noted above, the matters that trouble the Respondent are clearly resolvable because each concern has in fact been satisfactorily resolved with the Union and incorporated 25 into the parties' collective bargaining agreement. Accordingly, I find that the Respondent has not demonstrated a "sufficient showing of legitimate business objectives to justify the discriminatory aspect of the policy." Honeywell, supra, at p. 638; Great Dane Trailers, supra. Therefore I conclude that by maintaining the policy the Respondent has violated and is violating Section 8(a)(1) of the Act, as alleged in the complaint.

The Respondent's related argument goes to the remedy in this matter. As noted, the Respondent has resolved such matters with the Union, one of several unions representing its employees, and has, in effect, rescinded its policy vis-à-vis the unit employees covered by its collective bargaining agreement with the Union. With regard to the other unions, the Respondent would retain the status guo by continuing to maintain and enforce the policy, until such time as each other union requests bargaining over the subject and the parties have reached agreement. To be required to simply rescind the policy on an employer-wide basis, it is argued, without having resolved such matters with the other unions, would lead to an abundance of ad hoc grievances under the various collective bargaining agreements and would present additional costly and time-consuming administrative difficulties. Once again, the Respondent appears to contend that its perceived administrative or labor relations concerns override the detrimental effects to those employees who will continue to be eliminated from consideration for part-time jobs because of the Respondent's discriminatory policy. I do not agree. Moreover, to maintain an interim status quo would not further the Respondent's interests; rather, it would seem to invite further unfair labor practice charges. I find no merit to the Respondent's argument.

The Respondent also characterizes as "disputable," "doubtful" and "questionable" whether or not each of the three alleged discriminatees, namely Kathryn Milojevic, Nicole Hague and William Youngren, would have been denied the second position even in the absence of the policy, and maintains that there were other legitimate reasons for the Respondent's refusal to

offer them the specific non-unit jobs they sought. As set forth above, the employees were explicitly told by responsible representatives of the Respondent that they could not be hired or considered for the positions because the Respondent's policy precluded them from simultaneously holding both unit and non-unit jobs; and they were given no other reasons for their failure to be hired. The General Counsel having demonstrated that the Respondent's stated reason for its conduct was unlawful, and that the Respondent was seeking to fill the posted positions for which the named employees applied, the burden is then shifted to the Respondent to affirmatively show that the employees would have in any event not accepted the positions or would have been denied such positions for lawful reasons. The Respondent has not met this burden of proof. *Wright Line*, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), pp. 14 and 17.4 Therefore I conclude that by enforcing the policy and denying jobs to these individuals the Respondent has violated and is violating Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

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Conclusions of Law

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act, and a health care and a health care institution within the meaning of Section 2(14) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has violated Section 8(a)(1) and (3) of the Act as alleged.

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The Remedy

Having found that the Respondent has violated and is violating Section 8(a) (1) of the Act by maintaining a discriminatory hiring policy, I shall recommend that the Respondent rescind the policy and notify its employees and the unions with which it has collective bargaining agreements that it has done so. Having found that the Respondent has violated and is violating Section 8(a) (3) and (1) of the Act by its refusal to employ employees Kathryn Milojevic, Nicole Hague and William Youngren in the part-time positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, I shall recommend that the said employees be hired into those positions, replacing the current occupants of those positions if necessary. Further, I shall recommend that the named employees be made whole for any loss of earnings or other benefits they may have suffered, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

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⁴ The Board in *FES*, at p. 17, states, "It should have been determined at the unfair labor practice hearing [rather than at the compliance stage of the proceeding] whether the Respondent's failure to hire the discriminatees [applicants for employment] for those positions constituted unlawful refusals to hire warranting backpay and instatement."

ORDER⁵

The Respondent, Legacy Health System, its officers, agents, successors, and assigns, shall:

5 1. Cease and desist from:

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- (a) Maintaining and enforcing a discriminatory policy that deprives employees of job opportunities on the basis of whether their currently position is or is not a union-represented position.
- (b) Refusing to hire employees into positions they would have been hired but for the respondent's discriminatory hiring policy.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:
 - (a) Within 14 days from the date of this Order, rescind the discriminatory hiring policy, and notify its employees and the unions with which it has collective bargaining agreements that the policy has been rescinded.
 - (b) Within 14 days from the date of this Order, hire employees Kathryn Milojevic, Nicole Hague and William Youngren in the part-time positions to which they would have been hired but for the Respondent's enforcement of its unlawful hiring policy, replacing the current occupants of those positions if necessary, and make them whole in the manner set forth in the remedy section of this decision.
 - (c) Preserve and, within 14 days of this Order, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.
 - (d) Within 14 days after service by the Region, post at its various facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are

⁵ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

	customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.(e) Within 21 days after service by the Regional Office, file with the Regional Directo for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.		
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10	Dated: Washington, D.C. February 11, 2009		
15	Gerald A. Wacknov Administrative Law Judge		
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APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT maintain and enforce a policy that discriminates against employees by denying them the right to simultaneously hold both a union-represented and non-union-represented position within our organization.

WE WILL notify the Union with which we have collective bargaining agreements that we have rescinded the policy.

WE WILL NOT refuse to hire current employees for additional part-time positions on the basis of union considerations.

WE WILL hire employees Kathryn Milojevic, Nicole Hague and William Youngren in the part-time positions to which they would have been hired, replacing the current occupants of those position if necessary, and make them whole, with interest, for any loss of earnings and other benefits they may have suffered.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

	(Employer)	
Dated:	By:	
	(Representative) (Title))

LEGACY HEALTH SYSTEM

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's Office, 601 SW 2nd Avenue, Suite 1910, Portland, OR 97204-3170; Phone 503-326-3085.